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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1225

JOHN R. GAGNON,

Petitioner,

v.

GERALD H. SCARPELLI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

WILLIAM M. COFFEY
DENNIS P. COFFEY
152 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

Counsel for Respondent

JOHN F. EBBOTT
Freedom Through Equality
152 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

OF COUNSEL

Washington, D.C. • THIEL PRESS • (202) 393-0625

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GERALD H. SCARPELLI,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

On July 9, 1965, the Respondent entered a plea of guilty to a charge of armed robbery in violation of Section 943.32(1)(b)(2), Wisconsin Statutes, and was sentenced on that date to an indeterminate term of not more than fifteen (15) years at the Wisconsin State Reformatory, Green Bay, Wisconsin by the Honorable HOWARD J. DU ROCHER, County Judge, Branch 2, Racine County, Wisconsin. Execution of the sentence was stayed and Respondent was placed on probation to the State Department of Public Welfare (now known as the Department of Health and Social Services) for a period of seven (7) years.

On July 9, 1965, Respondent signed a "Parole Agreement" and a "Travel Permit and Agreement to Return." He thereupon travelled to Illinois and on August 5, 1965, the Adult Probation Department of the Circuit Court of Cook County, Illinois, accepted Respondent's probation supervision pursuant to the Uniform Act for Out-of-State Parolee Supervision. (Section 57.13, Wisconsin Statutes). The agreement signed by the Respondent provided that he waive extradition to the State of Wisconsin from any jurisdiction in or outside of the United States and that he could not contest any effort by any jurisdiction to return him to the State of Wisconsin. On August 20, 1965, Respondent's probation supervisor recommended to the State Department of Public Welfare that Respondent's probation be revoked by reason of his association with known criminals and his involvement in a burglary. On the same day, the District Administrator concurred in the recommendation, and on August 27, 1965, the Chief Probation and Parole Services made the same recommendation. Pursuant to these recommendations the Director of the State Department of Public Welfare, Wilbur J. Schmidt, entered an order revoking the petitioner's probation on September 1, 1965. The recommendations for revoking probation were based on the transcript of the statement allegedly given by the Respondent on August 5, 1965, to Mr. Robert J. Smart, Assistant States Attorney, Cook County, Illinois, and newspaper clippings from August 6, 1965, edition of the Chicago Tribune pertaining to the occurrence in Deerfield, Lake County, Illinois of a burglary.

Pursuant to the revocation order, the Respondent was picked up in Illinois at his place of employment on September 3 or September 4, 1965, and he was transported to the Sheriff's office, Niles, Illinois. On the

same day, Respondent was transported to the Racine County Jail, Racine, Wisconsin. Respondent was held overnight in the Racine County Jail and on the following day was transported to the Green Bay Reformatory. Respondent was received at the reformatory on September 5, 1965.

Respondent was never afforded a hearing, either by the State Department of Public Welfare or by the sentencing court prior to the revocation of his probation and transportation to the Green Bay Reformatory. Further, he was never granted a hearing of any kind in Illinois after he was picked up and prior to the time he was transported to the Racine County Jail. Respondent was also denied an opportunity to consult with a lawyer of his own choosing or appointed counsel prior to the revocation of his probation, prior to his removal from the State of Illinois to the Racine County Jail, and prior to his transportation to the Green Bay Reformatory.

On June 4, 1969, Respondent was released from incarceration by the State of Wisconsin and was paroled to a federal detainer. Respondent was previously sentenced to a term of eight (8) years on a federal conviction. That sentence was to be served concurrently with the sentence imposed in the State of Wisconsin. At the present time Respondent has been released from the Federal Correctional Institution at Leavenworth, Kansas and his status with regard to the State of Wisconsin is that of parolee.

Inasmuch as Respondent was on July 9, 1965, placed on probation for a period of seven (7) years, that probationary period were the revocation not to have interceded would have expired on July 9, 1972.

This statement of facts is presented as a result of certain exceptions being taken on the part of the

Respondent to the statement of facts presented in Petitioner's brief. Specifically, the Respondent takes exception to the Petitioner's relation of the facts surrounding the alleged involvement of the Respondent in a burglary occurring in Deerfield, Lake County, Illinois on Friday, August 6, 1965. The facts recited by the Petitioner are based entirely upon an account of the burglary appearing in the August 6, 1965 edition of the Chicago Tribune and upon a statement made by the Respondent to Assistant States Attorney Robert J. Smart in the Cook County Jail. The taking of this statement commenced at approximately 3:15 p.m. on August 6, 1965. Respondent while admitting the making of the statement has contended that the statement was made under duress. The Petitioner's characterization of the Respondent's explanation for the making of this statement as well as the Petitioner's characterization of the Respondent's explanation for a cut on the Respondent's hand as improbable explanations is irrelevant and immaterial to the instant proceeding. The Respondent was not convicted of the burglary occurring in Deerfield, Lake County, Illinois, on Friday, August 6, 1965, and charges arising out of the said burglary were dismissed upon Respondent's return to the State of Wisconsin. The Respondent was never convicted of any involvement in this burglary.

Additionally, the Respondent would point out that materials referred to by the Petitioner in his *Facts Relating To The Administration Of Law*, and appearing in the Addendum to Petitioner's brief, are in no way an exhaustive presentation of materials regarding parole and probation revocation proceedings, nor is there any indication, in light of the publication dates of these materials, that they are in any way representative of proceedings now conducted in Wisconsin.

SUMMARY OF ARGUMENT

Respondent would argue that this case should be dismissed in that it is moot as to him. It is a long-recognized doctrine of this Court that the decision of constitutional questions will be avoided if there is any other ground on which the issues presented by a controversy may be decided. In the instant case the Court of Appeals for the Seventh Circuit decided that the holding of *Hahn v. Burke*, 430 F.2d 100 (7th Cir. 1970) that a probationer facing revocation had a Due Process right to a hearing prior to revocation was applicable to Respondent.See *Gunsolus v. Gagnon*, 454 F.2d 416 (7th Cir. 1971) (this case below). The Court of Appeals' decision that the holding of *Hahn* is applicable to Respondent is not challenged in this action. In fact, the Petitioner concedes that probationers facing revocation are entitled, on the basis of *Morrissey v. Brewer*, U.S. , 92 S.Ct. , 33 L.Ed.2d 484 (1972), to such a hearing. Inasmuch as Respondent was denied a hearing prior to the revocation of his probation, that revocation was illegal regardless of this Court's decision regarding Respondent's right to the assistance of counsel at that hearing. Inasmuch as there is no authority in Wisconsin law providing for the tolling of the probationary period as a result of an illegal revocation and inasmuch as the District Court ordered the record of the revocation expunged from Respondent's record, the seven (7) year probationary period imposed on July 9, 1965, expired as of July 9, 1972 and this case is therefore moot as to the Respondent.

Assuming that this Court should find that the consequences surrounding the revocation of probation are significant enough to mandate the decision of the question presented in this case, it is Respondent's

contention that in light of the reasoning of this Court in its decision, last term, in *Morrissey v. Brewer*, ___U.S.___, 92 S.Ct.___, 33 L.Ed.2d 484 (1972), the revocation of any probation should be accomplished only after the completion of a hearing procedure meeting the minimal standards expressed in *Morrissey*. While *Morrissey* dealt with the revocation of a parole, no significant difference exists between the status of a parolee and that of a probationer, and therefore the procedural safeguards accorded parolees by *Morrissey* should be extended by this Court to probationers.

While the Court in *Morrissey* specifically withheld judgment as to whether or not the right to a hearing prior to revocation included the right to the assistance of counsel at that hearing, Respondent respectfully contends that the granting of a right to a hearing is, in large measure, the granting of a right void of significance unless that hearing includes the right of the probationer facing revocation to the assistance of counsel. A probation revocation hearing involves precisely the kinds of problems which a defendant in a criminal prosecution faces. The revocation hearing is an attempt to reconstruct certain disputed factual situations, the dispute occurring between the probationer and his supervising agent. Clearly, the reasoning in *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), which suggests that there are laymen illiterate and therefore incompetent to protect themselves in the trial of a matter before a Court is just as applicable in the case of a probationer facing an analogous situation in a probation revocation hearing.

This Court very early in its history recognized that the conduct of a hearing without the assistance of a lawyer, trained to develop complex defenses, is often not a hearing at all. In recent years this Court has broadened

the availability of the assistance of counsel from courtroom situations to administrative hearings, and Respondent would contend that the instant case is an appropriate one for this Court to hold that the Due Process Clause of the Fourteenth Amendment requires, minimally, that probationers, prior to revocation, be provided a hearing and as a concomitant right the assistance of counsel at that hearing.

ARGUMENT

I.

AS A CONSEQUENCE OF THE EXPIRATION OF THE ORIGINAL PROBATIONARY PERIOD IMPOSED UPON THE RESPONDENT AND AS THE RESULT OF THE MANNER IN WHICH THE QUESTION PRESENTED TO THIS COURT IS PHRASED, THIS CAUSE IS MOOT AS TO THE RESPONDENT.

Respondent contends that this cause should be dismissed because it is moot as to him. In *Rescue Army v. Municipal Court*, 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947), this Court discussed the "doctrine of strict necessity" noting that the Court had developed a series of rules for its own governance under which it avoided passing upon most of the constitutional questions raised before it. One of the rules there enumerated indicated that if the record of the case presented a non-constitutional ground upon which the case could be decided, the constitutional question involved in the case would not be adjudicated.

> If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is

unavoidable. *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105, 89 L.Ed. 101, 103, 65 S.Ct. 152. It has long been the Court's 'considered practice not to decide abstract, hypothetical or contingent questions . . . *or to decide any constitutional question in advance of the necessity for its decision* . . . * * *' 331 U.S. at 570 (Fn. 34) (Emphasis added)

Respondent was convicted of armed robbery on July 9, 1965 and sentenced to fifteen (15) years imprisonment. The sentence was stayed and he was placed on probation for a period of seven (7) years. On September 1, 1965, after recommendation by the Probation and Parole Services, his probation was revoked without hearing by the State Department of Public Welfare (now known as the Department of Health and Social Services of the State of Wisconsin).

In *Hahn v. Burke*, 430 F.2d 100 (7th Cir. 1970), it was held that a probationer had a right to a hearing prior to the revocation of his probation. *Gunsolus v. Gagnon*, 454 F.2d 416 (7th Cir. 1971) (this case below) made this right applicable to the Respondent and those probationers similarly situated. Neither the right to a hearing prior to the revocation of probation nor the applicability of the holding in *Hahn v. Burke, supra*, to Respondent is in issue before this Court. In fact, Petitioner concedes in his brief that a probationer is in all likelihood entitled to a hearing prior to revocation of his probation. (Petitioner's Brief, p. 18). The Respondent in this cause was not granted any hearing whatever.

Inasmuch as Respondent was denied his right to a hearing prior to revocation, the revocation by administrative order on September 1, 1965, was illegal and invalid regardless of any decision that this Court might make

regarding the right of Respondent to the assistance of counsel at a probation revocation hearing. Since this Court can decide the issue of counsel adversely to the Respondent and still not effect the propriety of the revocation of his probation, it need not and should not decide the issue of the right to counsel. *Rescue Army v. Municipal Court, supra.*

Moreover, there existing no authority in Wisconsin law for the proposition that the running of Respondent's probationary period was tolled upon the execution of the improper revocation, and the period of Respondent's probation having expired on July 9, 1972, this case is moot. Even assuming that the cause were to be remanded for a revocation hearing without counsel, Respondent could not be compelled to appear at such a hearing. He need only petition the Wisconsin Supreme Court or the District Court for the Eastern District of Wisconsin for his unconditional release from his present status as a parolee of the State of Wisconsin. Substantively this petition could be made on the basis of *Hahn v. Burke, supra,* and the decision of the Wisconsin State Supreme Court in *State ex rel. Johnson v. Cady,* 50 Wis.2d 540, 185 N.W.2d 306 (1970), which adopted the holding of the Court of Appeals for the Seventh Circuit in *Hahn v. Burke,* as the controlling law in the State of Wisconsin with regard to the issue of a hearing prior to the revocation of probation. Neither of these cases, *Hahn* nor *Johnson,* is in issue before this Court. Therefore, Respondent respectfully contends this cause should be dismissed as presenting a moot question in that he is, by lower court decision, guaranteed the right to a hearing prior to revocation, and this Court need not decide the question of Respondent's right to the assistance of counsel at such a hearing.

II.

ASSUMING THIS COURT DECIDES THE QUESTION PRESENTED BY THIS CASE IS NOT MOOT, THE COURT SHOULD EXTEND AND MAKE APPLICABLE TO PROBATIONERS THE HEARING PROCEDURE ESTABLISHED FOR PAROLEES BY *MORRISSEY V. BREWER*, ____ U.S. ____ (1972)–THOSE HEARINGS BEING REQUIRED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In *Morrissey v. Brewer*, (1972), this Court held that state correctional authorities seeking the revocation of a parolee's parole were required by the Due Process Clause of the Fourteenth Amendment to provide the parolee with certain procedural safeguards. These constitutionally mandated minima are essentially as follows. The parolee must be given:

> (a) Written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and the reasons for revoking parole. ___ U.S. ___, 33 L.Ed.2d at 499.

Morrissey established, as a minimum, a two stage proceeding intended to fulfill the needs of the state while protecting the "right" of the parolee–his conditional liberty. This is wholly in keeping with the historical application by this Court of the Due Process Clause. In *Hannah v. Larche*, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960), the Court said:

> 'Due process' is an elusive concept. Its exact boundaries are unidentifiable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly effect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. 363 U.S. at 441.

Mr. Justice Frankfurter, concurring in *Hannah*, also discussed the importance of balancing government and personal interests in arriving at a decision as to what process was due in a given case. He said:

> The precise nature of the interest alleged to be adversely affected or of the freedom of action claimed to be curtailed, the manner in which this is to be done and the reasons for doing it, the balance of individual hurt and the justifying public good—these and such like are the considerations, avowed or implicit, that determine the judicial judgment when appeal is to be made to "Due Process." 363 U.S. at 487-488.

See also *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961).

In *Morrissey*, the Court chose to describe this balancing process as follows:

> Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.' *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 128, 168, 95 L.Ed. 817, 852, 71 S.Ct. 624 (1951) (Frankfruter, J. concurring), quoted in *Goldberg v. Kelly*, 397 U.S. 254, 263, 25 L.Ed.2d 287, 296, 90 S.Ct. 1011 (1970). The question is not merely the 'weight of the individual's interest, but whether the nature of the interest is one within the contempla-

tion of the 'liberty or property' language of the Fourteenth Amendment. *Fuentes v. Chevin*, 405 U.S.____, 32 L.Ed.2d 556, 92 S.Ct.____ (decided June 12, 1972). ___U.S. at ___, 33 L.Ed.2d at 494.

This Court in *Morrisey* found that the nature of a parolee's interest in his continuation on parole was of such a kind as to be one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment, and consequently the Court held that Morrissey had a right to a hearing prior to revocation.

In the instant case, the Governmental interest and private interests are undistinguishable from the interest this Court had to balance in due process terms in *Morrissey*. The nature of the Respondent's interest in maintaining his status as a probationer is, like Morrissey's, of a kind such as to be within the contemplation of the "liberty or property" language of the Fourteenth Amendment.

This Court in *Morrissey* said:

> The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. * * * Though the state properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in prison. * * * The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. ___U.S. at ___, 33 L.Ed.2d at 494-495.

The above passage is as true of probationers as parolees. In Wisconsin, the very act of placing a man on probation recognizes that the state, via its judiciary, has determined

that future criminal involvement on the part of the probationer is unlikely. (See Section 57.01(1), Wisconsin Statutes (1967), Petitioner's Brief, p. 6). Most importantly, the probationer, like the parolee, relies on at least the implicit promise that revocation will result only upon a violation of the conditions of probation. The probationer thus has a significant, even if only conditional, right or interest in his probationary status, and revocation seriously injures the probationer's right.

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. *Greene v. McElroy*, 360 U.S. 474, 496, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959).

The probationer's interest or right in his status as a probationer is injured by an attempt on the State's part to revoke that probation. Consequently, he, like a parolee, should be granted the procedural safeguards insured parolees by the hearing process of *Morrissey v. Brewer*, *supra*.

III.

A PROBATIONER HAS A CONSTITUTIONAL RIGHT TO THE ASSISTANCE OF COUNSEL AT A REVOCATION HEARING.

A. The Right To Counsel Is Among The Most Basic Elements of Due Process

Respondent respectfully contends that the existence of a constitutionally guaranteed right to a hearing prior to the revocation of probation requires as a necessary corollary the right to the assistance of counsel at that

hearing. To grant probationers the right to a hearing prior to revocation while denying them the assistance of counsel would result in the granting of an empty right. The right to be assisted by counsel in proceedings which greatly affect an individual's rights has long been recognized as one of the rights most fundamental to due process of law. As this Court stated in *Holden v. Hardy*, 169 U.S. 366, 18 S.Ct. 383, 42 L.Ed. 780 (1898):

> . . . There are certain immutable principles of justice which inhere in the very idea of free government which no member of the union may disregard. 169 U.S. at 389.

This language was relied upon by this Court in *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), in holding that due process of law requires appointment of counsel in a capital case. The Court held that the right to the assistance of counsel:

> Is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' (Citing *Herbert v. State of Louisiana*, 272 U.S. 312, 316). 287 U.S. at 71-72.

Considering the question of what a "hearing" includes the *Powell* Court stated:

> Historically and in practice in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. *The right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel.* Even the intelligent and educated layman has small and sometimes no skill in the science of law. * * * He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. * * * If

> in any case, civil or criminal, a state court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing and therefore, of due process in the constitutional sense. 287 U.S. at 68, 69. (Emphasis supplied).

Noting that the defendant stood in peril of their lives, the Court in *Powell* examined the nature of the governmental function involved. It noted that defendants were young, ignorant and illiterate. They were being tried in an atmosphere of hostility, under close surveillance by the military, and far away from friends and family. Furthermore, they were imprisoned and thus unable to prepare their defense without counsel. A lawyer was found to be vital for the purposes of consultation, thoroughgoing investigation, and the preparation of a defense. *Powell v. Alabama*, 287 U.S. at 57.

Powell was decided, not upon the basis of the Sixth Amendment guarantee to the assistance of counsel in a criminal prosecution, but rather upon the due process clause of the Fourteenth Amendment. This decision, nevertheless, has become a touchstone for both due process and Sixth Amendment decisions.

Since *Powell*, the right to counsel has been considered essential to a fair trial, and the constitutional availability of counsel has constantly expanded. *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), established that the right to counsel was so fundamental that its waiver was required to be clearly determined and noted on the record. The Court stated that the right was:

> . . . Deemed necessary to insure fundamental rights of life and liberty. 304 U.S. at 462.

Ten years after *Powell*, *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942), was decided by this Court. Conceding the importance of counsel, it nevertheless determined that the right to the assistance of counsel was not a fundamental right in all cases, but only when counsel was so essential to fairness that appointment was imperative. 316 U.S. at 471. The *Betts* case is important because it severely limited *Powell* to its own facts and expressly held that counsel was not a "natural, inherent, and fundamental" principle of fairness. 316 U.S. at 464. In 1963, *Betts v. Brady* was overruled by *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The Court's opinion in *Gideon* made the Sixth Amendment applicable and obligatory on the states and held that an indigent defendant in a serious crime in a state court had the right to have counsel appointed for him. The basis for this decision was the fundamental character of the right to the aid of counsel as set forth in *Powell v. Alabama*, *supra*, which was no longer limited to its particular facts.

B. Since This Court's Decision In Gideon v. Wainwright, The Right To The Assistance of Counsel In Criminal Proceedings Has Been Vastly Expanded Recognizing That This Assistance Is Of Such A Fundamental Nature That It Cannot Be Denied.

After this Court's opinion in *Gideon v. Wainwright*, *supra*, the right to the assistance of counsel as required by the Sixth Amendment was extended beyond the bounds of the trial of a criminal prosecution itself by this Court's decision in *Massiah v. United States* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), which held a defendant was entitled to the assistance of counsel after indictment and release on bail. This period of time was

determined to be a "critical period of the proceedings" within the meaning of that term as found in *Powell v. Alabama, supra.*

The *Massiah*, decision foreshadowed this Court's opinion in *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), wherein the Court held that the right to counsel applied at a pre-indictment police interrogation, and that any incriminating statement made during that interrogation, after the suspect has requested and been denied an opportunity to consult with his lawyer, is excludable at trial. The Court cited *Powell* and *Massiah* in finding this investigatory process to be a critical stage in the proceedings, that is, a stage at which the suspect was most in need of an attorney.

> It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities have served a formal indictment. Petitioner had, for all practical purposes, already been charged with murder. 378 U.S. at 486.

Even though the period between the arrest and indictment of defendant was recognized as the period during which most confessions were obtained and even though this ruling would significantly diminish the number of confessions obtained, the Court held that:

> Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination.

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), expanded even further the right to counsel discussed in *Escobedo*. The Court in *Miranda* held that any statements obtained in a police interrogation which were not preceded by a police

warning to the suspect regarding the suspect's constitutional rights with regard to the assistance of counsel would be inadmissible as a violation of the Fifth and Sixth Amendments to the United States Constitution. Not only did the Court direct that an accused be notified of his right to counsel, but it also directed that upon any indication by the accused that he desired to consult with counsel prior to speaking, all interrogation had to cease pending the completion of that consultation.

Kirby v. Illinois, ____ U.S. ____, 92 S.Ct. 1877, ____ L.Ed.2d ____ (1972), the Court, in holding there was not right to counsel at pre-indictment line-ups, distinguished *Escobedo* and *Miranda* and stated that the Sixth and Fourteenth Amendment right to counsel attached "only at or after the time that adversary proceedings have been initiated against the defendant, (citing Powell), and thus the right did not attach prior to the indictment." ____ U.S. at ____.

Although this decision appeared to put a limitation on the right to counsel after it had been expanded to apply at arraignment, *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961); on appeal, *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); at preliminary hearings, *White v. Maryland*, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963); at post-indictment line-ups, *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), and *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); at probation revocation proceedings wherein there was a deferred sentencing, *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967); prior to the acceptance of a guilty plea, *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); at a non-essential preliminary hearing, *Coleman v.*

Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970); and on a petition for writ of certiorari to this Court, *Doherty v. United States*, ___ U.S. ___, 92 S.Ct. 175, 30 L.Ed.2d 149 (1971), it did not indicate on the part of this Court a retreat from the *Powell* analysis of the right to counsel as a fundamental principle of liberty and justice and as an essential feature of a meaningful hearing. Rather the Court in *Kirby* was concerned primarily with determining the point of commencement of:

> The "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable. ___ U.S. at ___.

This Court has recently further expanded the Sixth Amendment right to counsel by holding the assistance of counsel to be essential in any criminal prosecution, whether petty, misdemeanor, or felony, which might result in imprisonment. *Argersinger v. Hamlin*, ___ U.S. ___, 92 S.Ct. ___, 32 L.Ed.2d 530 (1972). In deciding *Argersinger* this Court relied upon *Powell* in describing the fundamental nature of the right to counsel and found that lawyers in criminal courts are necessities and not luxuries. The Court evaluated the interest of the accused in not being deprived of his liberty, even for a short period of time, and stated that the prospect of losing liberty even for a short time would not be viewed by an accused as a trivial matter. The Court weighed the accused's interest in this loss of liberty against the burden upon the Government of providing counsel. It reasoned that there were sufficient numbers of lawyers and law students available to satisfy the estimated requirement of 1575 to 2300 full time counsel.

Mr. Chief Justice Burger in his concurrence expressed concern with the burden on the states, but he found the individual interest involved and the critical function of counsel at criminal trials to outweigh that burden.

> Yet several cogent factors suggest the infirmities in any approach that allows confinement for any period without the aid of counsel at trial; any deprivation of liberty is a serious matter. The issues that must be dealt with in a trial for a petty offense or misdemeanor may often be simpler than those involved in a felony trial, and yet be beyond the capability of a layman, especially when he is opposed by a law trained prosecutor . . . ___U.S. at ___. (Mr. Chief Justice Burger, concurring)

This most recent construction of the Sixth Amendment by the Court and the resultant greater availability of the assistance of counsel reaffirms the principle enunciated by this Court in *Powell* that the right to counsel is fundamental to due process of law, under both the Sixth and Fourteenth Amendments. As the Court in *Powell* stated:

> The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' (*Herbert v. Louisiana*, 272 U.S. 312, 316, 71 L.Ed. 270, 272, 48 ALR 1102, 47 S.Ct. 103) is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, *although it be specifically dealt with in another part of the federal Constitution*, 287 U.S. at 67. (Emphasis supplied.)

Thus, the right to counsel is a right provided by the Due Process Clause of the Fourteenth Amendment, independent of the express guarantee of the Sixth Amendment, and counsel was deemed required under that clause until *Gideon v. Wainwright*, *supra*, held the Sixth Amendment applicable to the states. Although the

cases subsequent to *Gideon* have dealt primarily with the Sixth Amendment right and have continuously expanded that right, there existed prior to *Powell* and there exists today a Fourteenth Amendment right to counsel in non-criminal proceedings.

C. The Due Process Right To The Assistance Of Counsel Extends To Civil And Administrative Proceedings.

The right to counsel has been extended, under the Due Process Clause of the Fourteenth Amendment, to juvenile court proceedings–proceedings which are civil in nature.

In *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966), this Court held that when jurisdiction over a juvenile is waived from juvenile to adult court, the juvenile must be provided a hearing, the effective assistance of counsel, and a statement of reasons for the waiver. The Court did not require that the hearing provide:

> All of the requirements of a criminal trial or even of the usual administrative hearing, but we do hold that the hearing must measure up to the essentials of due process and fair treatment. 383 U.S. at 562.

It is significant that the right to counsel was considered one of the "essentials of due process."

The right of counsel was considered fundamental to another juvenile, civil proceeding–the adjudication of delinquency. In *Application of Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), this Court found that where the threatened loss of liberty is comparable in severity to the loss of liberty occasioned by a felony prosecution, a juvenile requires the assistance of counsel:

> To cope with problems of law, and to make skilled inquiry into the facts, to insist upon regularity of

> the proceeding, and to ascertain whether he has a defense and to prepare and submit it. 387 U.S. at 36.

The Court then held that the child and his parents were to be advised of his right to be represented by retained or appointed counsel.

Similarly, where a child is charged with an act which renders him liable to imprisonment for as long as six years, due process demands that his guilt be proved beyond a reasonable doubt, just as it requires that he be granted the assistance of counsel. *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The right to counsel has long been found necessary in deportation proceedings which are, despite the severe loss to the alien imposed by deportation, considered administrative in nature. The General Counsel for the Immigration and Naturalization Service has stated that:

> The right to be represented by counsel is one of the most important elements of due process of law. 1 Gordon and Rosenfield, *Immigration Law and Procedure*, Section 1.23.

And the Immigration and Nationality Act of 1952 now provides the right to counsel in proceedings adjudicating excludability or deportability.[1]

The fundamental nature of the right to be represented by counsel in administrative proceedings was recognized

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[1] "In any exclusion or deportation proceedings before a special injury officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." 8 U.S.C. Section 1362.

in the Administrative Procedure Act of 1946, 5 U.S.C. Section 551, et seq. This Act, which applies with certain exceptions to all federal agency proceedings, provides that each person compelled to appear before any agency is entitled to be represented by counsel. It also provides such right to any party who appears in an agency proceeding though not compelled to do so. See 5 U.S.C. Section 551 and 5 U.S.C. Section 555(b).

The most recognition of the right to counsel in administrative proceedings is *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), wherein this Court held the right to exist in state administrative proceedings terminating welfare benefits. The Court there quoted *Powell v. Alabama, supra*, and stated:

> We do not say that counsel must be provided at the pretermination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient. 397 U.S. at 270.

Thus, the due process right to the assistance of counsel has been recognized to exist in a number of non-criminal administrative proceedings.

D. The Due Process Right To The Assistance Of Counsel Applies To Adjudicatory Administrative Proceedings.

The right to the assistance of counsel is not an essential one in all administrative proceedings. The test by which it is determined whether fundamental due process rights apply to administrative proceedings was enunciated by this Court in *Hannah v. Larche*, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960). The Court, noting that due process is an elusive and flexible concept, stated:

> Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. 363 U.S. at 442.

The Court found a purely investigative non-adjudicatory proceeding by the United States Civil Rights Commission not to require the right of confrontation and cross-examination or notice of the identity of persons making complaints to the commission. The function of the Civil Rights Commission was described as:

> Purely investigative and fact finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make any determinations, depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal right. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action. 363 U.S. at 441.

Even though the Commission's investigation as to whether voting registrars in the South had practiced racial discrimination might result in those registrars suffering approbrium and scorn, the loss of their jobs, and the threat of criminal prosecution, those consequences were found to be purely conjectural.

However, even if such collateral consequences were to flow from the Commission's investigations, they would not be the result of any affirmative determinations made by the Commission, and they would not affect the legitimacy of the Commission's investigative function. 363 U.S. at 443.

In contrast, this Court determined that due process required the right to confrontation and cross-examination and the right to present evidence in adjudicative investigations conducted by the Louisiana Labor Management Commission of Inquiry. *Jenkins v. McKeithen*, 395 U.S. 411, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969). Although the Act under which the Commission operated was drafted with *Hannah v. Larche* in mind, and the structure and powers of the Commission were similar to those of the Civil Rights Commission, the adjudicative nature of the Louisiana commission compelled the providing of fundamental due process rights.

> It is true . . . that the commission does not adjudicate in the sense that a Court does, nor does the commission conduct, strictly speaking, a criminal proceeding. Nevertheless, the Act, when analyzed in light of the allegations of the complaint, makes it clear that the commission exercises a function very much akin to making an official adjudication of criminal culpability . . . In short, the commission very clearly exercises an accusatory function; it is empowered to be used and allegedly is used to find named individuals guilty of violating the criminal laws of Louisiana and the United States and to brand them as criminals in public. 395 U.S. at 427-428.[2]

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[2]The Court did not decide whether there need by provided meaningful rules of evidence, standards of guilt or innocence, and effective assistance of counsel, leaving those issues to the District Court on remand. It is noteworthy that there was already a limited right to counsel.

Consequently, the Court found that the procedures of the Commission did not meet the minimal requirements made obligatory on the states by the Due Process Clause of the Fourteenth Amendment. 395 U.S. at 428.

The functions of a probation and parole board in probation revocations under the standards set out in *Morrissey v. Brewer*, ___ U.S. ___, 92 S.Ct. ___, 33 L.Ed.2d 484 (1972), are much more like those in the *Jenkins* case, *supra*, than those in *Hannah v. Larche*, *supra*. The board is adjudicative in nature. In the case of Respondent, it makes determinations as to whether he associated with known criminals and whether he was involved in a burglary. On the basis of these determinations, it can remand him to his probationary status or revoke that status. If it revokes, it takes from him his conditional liberty, sending him to prison for a period of fifteen (15) years. The Parole Board, therefore, makes determinations depriving Scarpelli of liberty. It issues orders. It imposes legal sanctions, and it takes affirmative action affecting an individual's legal rights. It is not limited to findings of fact "which may subsequently be used as a basis for legislative or executive action." *Hannah v. Larche*, 363 U.S. at 441. The Board "exercises a function very much akin to making an official adjudication of criminal culpability," *Jenkins v. McKeithen*, 395 U.S. at 427-428, in that it determines whether Scarpelli has been involved in a burglary and on the basis of that determination orders a return to prison. This adjudicatory function was acknowledged and described by the American Bar Association Project on Standards for Criminal Justice when it specifically required representation by retained or appointed counsel in any probation revocation proceeding. *Standards Relating to Probation*, Section 5.4(a)(ii). In its Commentary to this section, the Committee report stated:

> The central task of ascertaining whether the prisoner has committed the acts alleged, and measuring the acts proven against the standard to which he was obliged to conform is precisely the business of the criminal trial itself where the right to the assistance of counsel has been recognized as one of the "immutable principles of justice." Indeed, it may in many contested revocation proceedings, the conduct charged actually constitutes the commission of a criminal act . . . [I]t would seem patently at war with the central concept of procedural justice to deny to a person with his liberty at stake the opportunity to hear and meet the specific charge against him with the benefit of counsel. *Commentary*, Section 5.4(a)(ii), *Standards Relating to Probation*, at p. 68.

In view of this function, it is clear that the Due Process Clause requires that a probationer, compelled to appear before the Board, be provided with counsel under the rationale of *Hannah v. Larche, supra*, and *Jenkins v. McKeithen, supra.*

IV.

THE RIGHT TO THE ASSISTANCE OF COUNSEL IS AN ESSENTIAL ELEMENT OF DUE PROCESS OF LAW IN PROBATION REVOCATION PROCEEDINGS.

It has frequently been stated that the concept of due process is flexible and not a technical conception with a fixed content.

> Due process is not confined in its scope to the particular forms in which rights have heretofore been found to have been curtailed for want of procedural fairness. Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in

> insuring fundamental justice, it is also a living principle, not confined to past instances. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 173-174, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Mr. Justice Frankfurter, concurring.)

In determining a proper application of the Due Process Clause in a particular situation it is necessary that an examination be made as to whether or not an individual will be "condemned to suffer a grievous loss," *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. at 168, as well as an examination of the "precise nature of the governmental function involved . . .' *Cafeteria and Restaurant Workers Union v. McElroy*, 376 U.S. at 895. Having once examined and determined the governmental function involved as well as the private interest effected it is necessary to arrive at a proper balancing of those factors. In *Morrissey v. Brewer, supra*, this Court found that a grieyous loss was present in the loss of a parolee's conditional liberty. Against this interest of the individual in retaining his liberty as well as society's interest in his rehabilitation and fair treatment, this Court balanced the State's:

> . . . Overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole. ___ U.S. at ___, 33 L.Ed.2d at 495.

Overwhelming as this interest is, the State has no interest in revoking parole without some informal procedural guarantees which will "assure the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." 33 L.Ed.2d 495.

Applying this same rationale to the facts presented by this case, the necessity for retained or appointed counsel at probation revocation hearings becomes evident.

A. The Private Interest Affected by Governmental Action.

As this Court held in *Morrissey v. Brewer, supra,* the termination of parole inflicts a grevious loss on the parolee and often on others.

> . . . The liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others. 33 L.Ed.2d at 495.

As discussed in Section II above, probation is like parole and frequently a probationer enjoys a freedom even less restricted than that of a parolee. The revocation of either status results in grievous loss sufficiently serious to require minimal procedural safeguards. One of the most fundamental of these safeguards is the right to the assistance of counsel.

Under the analysis of *Cafeteria and Restaurant Workers Union v. McElroy, supra,* therefore, the probationer has an interest in not losing his liberty, however conditional. Society has an interest, as it does with the parolee, in "restoring him to normal and useful life within the law" and in preventing revocation "because of erroneous information or because of an erroneous evaluation of the need to revoke (probation) given the breach of (probation) conditions." *Morrissey v. Brewer,* ___ U.S. at ___, 33 L.Ed.2d at 496.

B. The Nature of the Governmental Function Involved.

Considering the adjudicative nature of the governmental function, it is in enhancing the integrity of the fact finding process that counsel becomes essential, both to protect the individual faced with grievous loss and to protect the interest of society. *Miranda v. Arizona, supra*, 384 U.S. at 466-470.

It is most difficult to accept Petitioner's assertion that:

> It is a fact of life that no probationer or parolee is recommended for revocation unless he did the things alleged against him. This is because the probation or parole agent is so strongly motivated against revocation that he does not recommend it unless he is sure, . . . Petitioner's Brief, p. 40.

As stated above, revocation proceedings are adversary proceedings in that, at least where contested, a factual determination must be made and a determination is best made where in-put is available from both the agent recommending revocation and from the probationer challenging that recommendation. To rest the continuance of or the denial of a probationer's freedom solely on the basis of a probation agent's good will or good intentions is a very dangerous proposition. The danger of permitting uncontestable administrative action is highlighted by this Court's recitation of a portion of the District Court opinion in *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). The District Court said:

> [T]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him

so that he may contest its basis and produce evidence in rebuttal. 294 F.Supp. at 904-905. 397 U.S. at 266.

The Court in *Goldberg* found not only that the hearing was required to protect recipients from unjust administrative action but found the right to the assistance of retained counsel to be a right guaranteed recipients facing termination.

In *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959), the Court discussed the need for confrontation and cross-examination.

> ... The evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. 360 U.S. at 496.

Discussing the actions of a school board in expelling certain students who had participated in a mass protest the Fifth Circuit Court of Appeals said:

> By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of facts concerning the charged misconduct easily colored by the point of view of the witnesses. *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 158 (5th Cir. 1961).

Counsel's value then in a probation revocation proceeding lies in his ability to marshal the facts, introduce evidence or mitigating circumstances and in general aid and assist

the probationer to present his case. See *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967). *Menechino v. Warden*, 27 N.Y. 376, 21 N.Y.S.2d 449 (1970); *United States ex rel. Bey v. Connecticut State Board of Parole*, 443 F.2d 1079 (2nd Cir. 1971); *ABA Standards Relating to Probation*, Section 5.4(a)(ii), *Commentary; Ahern v. Board of Education, School District of Grand Island*, 456 F.2d 399 (8th Cir. 1972); *Warren v. Michigan Parole Board*, 23 Mich. App. 754, 179 N.W.2d 664 (1970) and *Williams v. Patterson*, 389 F.2d 374 (10th Cir. 1968).

The reasoning of Mr. Justice Sutherland in *Powell v. Alabama, supra*, is as appropriate and valid in the present day in a probation revocation setting as it was then, and truly as it has been since the legal system in this country was initiated. For just as the right to be heard would have been of little avail in 1932 in a hostile courtroom in Alabama without the assistance of counsel, that right is of little avail in this day in a revocation proceeding unless the right to counsel is guaranteed. Just as there were ignorant and illiterate and feeble-minded men in 1932, there are ignorant, illiterate and feeble-minded men in 1972. It has always been recognized that:

> A lawyer's training particularly suits him to analyze and organize for the benefit of an impartial tribunal evidentiary matter bearing on the occurrence or non-occurrence, as well as the significance, of past events. See *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967). *United States ex rel. Bey v. Connecticut State Board of Parole*, 443 F.2d 1079, 1087 (2nd Cir. 1971).

The Court in *Bey* discussed the value of a trained lawyer to a parolee facing revocation. The Court said:

A trained lawyer might well have discovered mitigating circumstances and hidden significances not revealed or immediately obvious on the face of Mercer's report. For example, the Board might well have welcomed the suggestion for a fuller investigation of Bey's alleged announced intent to depart the state or his oblique threat to repeat his past crimes. Perhaps Bey's employers could have supplied useful information as to Bey's dependability and thoroughness on the job. A review of Bey's reported letters to Porter School girl students might have revealed different hues and motivation than found their way into Mercer's report.

Thus, at the least, a diligent lawyer representing Bey before the Parole Board might have investigated the decisive events of Bey's brief period of release and in an orderly, disciplined presentation to the Board, have attempted to establish facts more favorable to Bey than those presented by Mercer and McIlduff and have suggested their relevance to the four alternatives less severe than revocation available to the Board in disposing of Bey's case. 443 F.2d at 1088.

Had the Respondent in the instant case been granted the right to the assistance of counsel at a revocation hearing, the lawyer could have analyzed the factual occurrences upon which the recommendation of the Respondent's supervising agent were based and the lawyer could have marshalled the facts involved and presented the occurrences in a light more favorable to the Respondent than that found in the recommendation of the supervising agent. Additionally, a lawyer could have discovered mitigating circumstances which might have weighed heavily in the final decision of the Department of Public Welfare as to whether to revoke or not. An attorney is obviously better suited as a result of his

training and his daily involvement in contentious matters to effectively present a case before the supervising authority than is a probationer overwhelmed by the administrative agency.

> The fact that the Board performs a predictive and prognostic function does not depreciate the importance of accurate factual exposition and evaluation. *Bey*, 443 F.2d at 1088.

This is especially true if the probationer has little intelligence or education, *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct 747, 21 L.Ed.2d 718 (1969), or is already incarcerated prior to the final decision upon his revocation. Such incarceration makes it all but impossible for the probationer to prepare his defense without the aid of counsel, and it is a factor which has been raised by this Court in both *Powell v. Alabama, supra*, and *Johnson v. Zerbst, supra*, and recognized as compelling the assistance of counsel. The Respondent was incarcerated while the Department reviewed his probation agent's recommendation to revoke probation.

Given the adjudicative nature of the governmental function, counsel is essential to protect the interests of the probationer against the grievous loss of incarceration for a number of years as well as to further the societal interest of preventing the revocation based upon erroneous information. Society, as was recognized in *Morrissey v. Brewer, supra*, has an interest in treating the probationer and the parolee with basic fairness and thereby increasing the likelihood of rehabilitation. The societal interests are of course shared by the state, which has a further interest in preventing erroneous probation revocations—the great financial cost of keeping a man in prison. Warren, *Probation in the Federal System of Criminal Justice*, 19 Fed. Prob. 3 (Sept. 1955); *Annual*

Report, Ohio Adult Parole Authority, 1964/65 at 13-14; *Note, Parole: A Critique of Its Legal Foundations and Conditions*, 38 N.Y.Univ. Law Review, 702, 705-707 (1963). (All cited in *Morrissey v. Brewer*)

C. The Burden On Government of Providing The Right to Counsel.

Against the interests discussed above is balanced the state's interest in revoking probation and imposing the prison sentence without a new criminal trial and in conducting its revocation proceedings with minimal expense and administrative inconvenience. To suggest, as the Petitioner does, however, that the question presented here can or should be answered on the basis of economic effect is unjustifiable. The right to be infringed–the loss of freedom–even if only conditionally granted, cannot be valued monetarily. In *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939), Mr. Justice Stone, concurring, said:

> There are many rights and immunities secured by the Constitution, of which freedom of speech and assembly are conspicuous examples, which are not capable of money valuation. . . . 307 U.S. at 529.

The right to the assistance of counsel in probation revocation hearings may not be as conspicuous a right, but it, like freedom of speech and assembly, cannot be measured in terms of a mill rate, as Petitioner suggests. This Court has held that in the welfare context, the governmental interests of expense and administrative inconvenience are not overriding when balanced against the individual right and that the state had the capacity to reduce costs and administrative burdens.

Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled

> with the state's interest that his payments not be erroneously terminated, clearly outweighs the state's compelling concern to prevent any increase in its fiscal and administrative burdens. *Goldberg v. Kelly*, 397 U.S. at 266.

Similarly, the probationer's interest in retaining his liberty coupled with the state's interest that he not be erroneously incarcerated, clearly outweigh the state's competing interest in minimizing fiscal and administrative burdens.

It should be noted that the State of Wisconsin has, since the summer of 1972, provided juveniles in parole revocation proceedings with the right to counsel, *State ex rel. Bernal v. Hershman*, 54 Wis.2d 626, 196 N.W.2d 72 (1972), and the State of Wisconsin has also extended the right of probation revocation hearings with counsel to adults. *Oestrich v. State*, 55 Wis.2d 222, 198 N.W.2d 664 (1972).

A lawyer's participation in probation revocation need not impede the flow of relevant information to the Board, inasmuch as the reviewing official can control the proceedings and prohibit dilatory or distracting tactics.

> Counsel's proper role is to *assist* the Board, not to impede it, and the Board may take appropriate measures to assure that counsel appreciates his limited role and presents his client's case accordingly. *Bey*, 443 F.2d at 1089.

There has never been demonstrated that the provision of more rights in revocation proceedings, whether probation or parole, results in fewer paroles being granted. Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J.Crim.L.C. and P.S. 174, 175, 194, Note 157 (1964). Nor will the right to counsel introduce friction into the probationer-probation agent

relationship, which is already near an end when the officer recommends revocation. To suggest that a probation agent recommending revocation and the probationer are seeking the same end seems naive at best. They are adversaries and the probation agent as an adversary has the whole weight of the supervising agency behind him. The probationer, on the other hand, is alone and needs the assistance of counsel to effectively vindicate his right before that agency.

CONCLUSION

Should this Court determine that the question presented in this case is not moot, it is respectfully submitted that the judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

Dated at Milwaukee, Wisconsin the 26th day of October, 1972.

Respectfully submitted,

WILLIAM M. COFFEY
DENNIS P. COFFEY
152 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
Attorneys for Respondent

Of Counsel
JOHN F. EBBOTT
Freedom Through Equality
152 West Wisconsin Avenue
Milwaukee, Wisconsin 53203